MOTION FILED
DEC 24 1981

No. 81-202

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Petitioners,

—v.—

CLAIBORNE HARDWARE COMPANY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

MOTION OF AMERICAN JEWISH CONGRESS FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE

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The American Jewish Congress respectfully moves for leave to file the attached brief *amicus curiae*. Counsel for the Petitioners have consented to the filing of this brief. Counsel for Respondents have not.

The American Jewish Congress, a national organization of American Jews, was established in 1917, in part to protect the religious, civil, political and economic rights of Jews and to promote the principles of democracy. Since its inception, the American Jewish Congress has regarded the vigorous assertion of the views of its members on national issues as a moral obligation. To promote those views, the AJC has employed picketing and, where appropriate, boycotting, both forms of expression improperly prohibited and punished by the decision below.

For example, early in its history this organization organized the 1930s boycott against Nazi Germany.[1] Since then, the AJC has been among the organizations supporting boycotts of farm and textile products in connection with labor disputes. Most recently, we have supported a boycott of convention facilities in states that have failed to ratify the proposed Equal Rights Amendment. *See Missouri* v. *National Organization for Women, Inc.*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980).

Such politically motivated boycotts can be successful only if a large number of persons participate. In the course of gathering such support, a boycotting organization can make clear to all of its members their obligation to refrain from illegal conduct. But our own experience tells us that even an organization historically committed to exclusively peaceful activity in pursuit of its goals may on occasion find that third parties who support the same goals act with less restraint.[2] We believe that it is not consistent with the First Amendment, or with the long tradition of political protest in the United States, to punish or prohibit legitimate political activity, including boycotts, simply because some supporters behave illegally or improperly.

Yet the court below did just this. It held a boycotting organization and its active members liable for all the economic consequences of the boycott itself and enjoined all future boycott-related speech and conduct, without properly distinguishing between the lawful and supposedly unlawful activities involved and without regard to the lack of participation of the sponsoring organization in any improper act. We believe that, if such a result is allowed on the basis of the evidence in this case, organized political activity of a kind long recognized as having constitutional protection would effectively be prohibited.

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1 *See* M.L. Urofsky, *A Voice that Spoke for Justice* 264-67 (1981).

2 Urofsky, *supra*, at 267, quotes Judge Julian Mack as saying of a meeting during the Nazi boycott: "The easiest thing in the world could have been to arouse that audience . . . to murderous rage."

We thus believe that affirmance by this Court of the decision of the Mississippi Supreme Court in this case would place an unreasonable restraint on legitimate political activity of the sort carried out by the AJC. We believe further that our years of experience as an organization which not only engages in vigorous activity on public issues but also participates in many legal proceedings involving constitutional freedoms enable us to make a significant contribution to this Court's consideration of this case. Accordingly, the American Jewish Congress moves for leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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INTEREST OF AMICUS

The interest of *amicus* appears in the accompanying motion.

STATEMENT

As the brief of Petitioners has discussed in detail, this case involves an economic boycott, started in 1966 by black citizens of Claiborne County, Mississippi, in support of their demands for basic political and civil rights (*e.g.*, hiring of black employees by local merchants; desegregation of public schools; integration of the police force; compliance with the Civil Rights Act of 1964; cessation of the practice of local police addressing adult blacks as "boy", "shine", and so forth; allowing blacks

to serve on juries; etc.). The courts below, consistent with the pattern of Mississippi officials with respect to civil rights claims during the 1960s,[1] found that Petitioners' boycott was a "civil conspiracy," issued an injunction prohibiting future speech and conduct in support of the boycott, and held the participants in the boycott liable for all resulting business losses.[2] The Mississippi courts' justification for this result was that a number of "unlawful activities," including some violence but consisting in large part of constitutionally protected speech, took place during the three-year period of the boycott. According to the Mississippi courts, these "unlawful" activities could be ascribed to the Petitioners as a whole so as to render the entire boycott illegal under the State's common law of conspiracy. *NAACP* v. *Claiborne Hardware Co.*, 393 So. 2d 1290, 1300-01 (Miss. 1981).

The central flaw in the decisions below is the Mississippi courts' failure to distinguish between lawful and unlawful conduct, between violence which is planned by protest organizers and that carried out independently by a few sympathizers, and between innocent and culpable individuals. These failures so taint all of the conclusions reached below, as well as the findings made by the trial court, that it is impossible to

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1 A valuable description of the resistence by state and county officials to desegregation and other attempts to obtain civil rights for Mississippi's black citizens is contained in this Court's opinion in *United States* v. *Barnett*, 376 U.S. 681 (1964) (describing then Governor Barnett's implementation of "the state's policy of massive resistance" to this Court's orders), and in L. Friedman (ed.), Southern Justice 13-42, 80-111, 136-55 (1965) (describing the enactment and attempted enforcement of Mississippi's "massive resistance" statutes and ordinances, and the use of those and other laws to harass civil rights workers).

2 We do not discuss in this *amicus* brief the question whether the validity of the injunction, as distinguished from the award of damages, is properly before this Court. Because our review of the record suggests to us that both issues are properly before this Court, this brief is addressed to both the damage award and the injunction. We note, however, that our argument would apply even if only the damage award were at issue.

determine from the opinions below what result would have been reached had the courts applied the proper legal standards.

The blunderbuss approach of the courts below is well-illustrated by their conclusion that the boycott was a "conspiracy" because at the time of the boycott there was (i) "social ostracism," "vilification," "traduction," and other such activity obviously protected by the First Amendment, but described by the Mississippi courts with various pejorative adjectives; (ii) an "atmosphere" of fear; and (iii) acts of violence by a small number of individuals.[3] It is impossible to be certain from the opinions of the courts below the extent to which the first two items, which should not have been considered, affected their findings, but it is apparent that they relied on these improper considerations to a significant degree.

Moreover, it is not clear why the Mississippi courts thought the NAACP or most of the other defendants could be held liable for the limited violence that did occur. There was no

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3 The Mississippi Supreme Court noted, but did not rely on, the alleged "secondary" nature of the Port Gibson boycott. (The trial judge below had considered the claimed "secondary" nature of the boycott as an additional factor in concluding that the boycott was unlawful). The boycott in question, however, was not secondary. A major part of the Petitioners' demands involved employment discrimination and fair customer treatment at the stores being boycotted. Moreover, the record is clear that a number of the merchants boycotted held public office and were in a position to address the governmental discrimination that formed a partial basis of the protest. Indeed, a number of the merchants had been appointed by the Port Gibson city government to represent it in negotiations with the NAACP. The targets of the boycott, in short, were not innocent and unintended victims; they were the town fathers and a central part of the governmental and commercial power structure of Port Gibson.

In any event, even to the extent the boycott might properly be characterized as secondary, that fact is irrelevant given the political, noncommercial purpose it had. *See Missouri* v. *National Organization for Women*, 620 F.2d 1301, 1304 n.4, 1312 n.12 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980); *cf. Eastern Railroad Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 143-44 (1961). In the circumstances of this case, the Port Gibson boycotters had the right to follow the subject matter of their dispute. *See Bakery & Pastry Drivers & Helpers Local 802* v. *Wohl*, 315 U.S. 769, 775 (1942).

evidence that the NAACP or other boycott organizers encouraged or authorized such acts, that there was an agreement among Petitioners to engage in violence, or that the Respondent merchants lost any identifiable business as a result of such acts. Indeed, it is noteworthy that the "violence" upon which the Mississippi courts purport to rest their decision was so isolated that the chief of police, who was hardly sympathetic to the boycotters, arrested no more than three individuals for boycott-related activities, and the county sheriff, who was no more sympathetic, made only five such arrests in three years.

To make matters worse, the courts below gave no consideration to the individual culpability of the 130 defendants. The trial judge simply found against all 130 properly named defendants, with a single exception. The Supreme Court of Mississippi did set aside the judgment as against nearly one-third of those defendants for lack of *any* evidence at all supporting their liability. But the Mississippi Supreme Court gave no indication of the basis upon which all 92 of the other defendants were held jointly and severally liable.

A further defect is the extent to which the Mississippi courts' negative views of the merits of the boycott affected their conclusions. For example, the trial court judge commented that the black population of Claiborne County was sufficient for the NAACP to obtain its ends "without the necessity of rancor, ill-will, threats, violence, or the visitation of economic ruin on the white merchants of the area";[4] that the boycott intensified after the assassination of Martin Luther King, Jr.,

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4 A more reliable portrayal of the civil rights situation in Mississippi in the years preceding the boycott is contained in the 1963 report of the United States Civil Rights Commission describing the situation in Mississippi and elsewhere in the South at that time:

> "Citizens of the United States have been shot, set upon by vicious dogs, beaten and otherwise terrorized because they sought to vote. Since October, students have been fired upon, ministers have been assaulted and the home of the Vice Chairman of the State Advisory Committee to this Commission has been bombed. Another member and his wife were jailed on trumped-up charges after their home had been defiled. Even children, at the brink of starvation, have

despite the fact that "it is difficult for this court to understand how the white people of Claiborne County, Mississippi, could be deemed responsible in any sense for a barbaric murder in Memphis, Tennessee"; and that the boycotters had branded the merchants "automatically and conclusively guilty of discrimination against the defendants and all black citizens of Claiborne County" by virtue of their being white.

The Mississippi Supreme Court expressed similar sentiments and attempted to belittle the need for a boycott, arguing that "[w]ith the momentous weight of civil rights progress . . . , by the time the boycott here involved had begun the blacks had obtained overpowering authority in the ballot box." 302 So.2d at 1295.[5]

A fair reading of the opinions below makes it clear that, rather than respecting the First Amendment rights of Petitioners, the Mississippi courts found the boycott personally objectionable in various respects and allowed that to color their findings and conclusions throughout.

Neither decision below is entitled to any deference here, as both are tainted by a failure to focus upon the proper factual issue—whether each defendant was a member of a "conspiracy" which chose violence or other unlawful acts as a means of promoting the boycott. A finding of "conspiracy" by a court which cannot distinguish protected First Amendment activity from unlawful acts is worthless. Indeed, the frightening result of the Mississippi Supreme Court's decision lies in its holding that some vague degree of disorder, attributed with no

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been deprived of assistance by the callous and discriminatory acts of Mississippi officials administering Federal funds." April 1963 Civil Rights Commission Interim Report, *reprinted in* L. Friedman (ed.), Southern Justice at 234 (1965).

5 History scarcely supports such a claim. Indeed, in a case decided just the year before the start of the boycott, this Court took note of the elaborate and largely successful efforts of the State of Mississippi to curb voting by blacks. *United States* v. *Mississippi*, 380 U.S. 128 (1965).

specificity to the vast number of Petitioners, can justify a broad forfeiture of their First Amendment liberties. That holding, we submit, must be reversed.

SUMMARY OF ARGUMENT

1. *The Port Gibson Boycott Is Protected by the First Amendment.* Petitioners' boycott, as well as the speech-related activities engaged in by Petitioners to further the boycott, are protected by the First Amendment to the Constitution. Politically motivated economic boycotts have a long and honored history in our nation. Moreover, the decisions of this Court have consistently endorsed the right of citizens to organize and induce others to participate in such boycotts. That right has thus been implicitly recognized in a series of cases involving the picketing and patrolling of business enterprises. *See, e.g., Thornhill* v. *Alabama,* 310 U.S. 88, 99, 104-05 (1940). Although this Court has not directly addressed the issue, a number of circuit court decisions have applied these principles to civil rights boycotts. *E.g., Missouri* v. *National Organization for Women, Inc.,* 620 F.2d 1301 (8th Cir.), *cert. denied,* 449 U.S. 842 (1980); *Henry* v. *First National Bank of Clarksdale,* 595 F.2d 291 (5th Cir. 1979), *cert. denied,* 444 U.S. 1074 (1980) (involving the present boycott).

There is no doubt that the vast bulk of the activities designed to further the Port Gibson boycott, including marching, oratory, and pamphleteering, is similarly guaranteed by the First Amendment. Each such activity was part of a protest of racial discrimination and segregation in the State of Mississippi in the 1960s. Each constituted "an exercise of . . . basic constitutional rights" which have "always rested on the highest rung of the hierarchy of First Amendment values. . . ." *Carey* v. *Brown,* 447 U.S. 455, 466-67 (1980). The holding of the Mississippi Supreme Court that some of the expression in question amounted to "intimidation, threats, . . . vilification, and traduction" and caused "social ostracism" and was thereby not entitled to the protection of the First Amendment

was plain error. Those types of speech have repeatedly been held protected by decisions of this Court. *See, e.g., Old Dominion Branch No. 496* v. *Austin,* 418 U.S. 264 (1974); *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415 (1971); *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964).

Moreover, the mere presence of a handful of acts of violence in Claiborne County, Mississippi during the three-year-long boycott does not render the boycott itself, let alone the peaceful protest activities engaged in by the Petitioners in furtherance of the boycott, illegal or remove from them the protection of the First Amendment. The reliance of the Mississippi Supreme Court on the decision of this Court in *Milk Wagon Drivers' Union Local 753* v. *Meadowmoor Dairies, Inc.,* 312 U.S. 287 (1941), to reach a contrary conclusion was erroneous. *Meadowmoor* is a forty-year old labor case decided prior to the development of modern-day First Amendment law and is of doubtful applicability to the present civil rights issues. But in any case, the decision in *Meadowmoor* applied only to pervasive and inevitable violence, not to the "social ostracism, vilification and traduction" condemned by the Mississippi Supreme Court. Indeed, it is noteworthy that not a single case has come before this Court since *Meadowmoor* presenting circumstances of violence so enmeshed with peaceful boycott activities as to warrant an injunction of that activity in reliance on *Meadowmoor*; and it is plain that this is not such a case.

2. *The Boycott Was Not a "Civil Conspiracy".* The decision below found liability as to all Petitioners on a theory of civil conspiracy. That finding is wrong both as a matter of conspiracy law and because, on the facts of this case, it is repugnant to the First Amendment.

It is clear that a conspiracy cannot exist unless there is an agreement to accomplish an *unlawful* purpose or an agreement to accomplish a lawful purpose by *unlawful* means. *See Iannelli* v. *United States,* 420 U.S. 770, 777 (1975). A conspiracy cannot be demonstrated to have existed in this case by the mere fact that the NAACP and other Petitioners agreed to boycott

white merchants. Again, that agreement is protected by the First Amendment.

Moreover, even if a conspiracy could be demonstrated by virtue of the fact that during the years of the boycott a handful of violent incidents took place, the record reflects no evidence whatsoever that the Petitioner NAACP or all of its members who participated in the boycott agreed to accomplish an illegal objective or to employ violence or other illegal means in furtherance of the boycott. Yet such evidence is required before these Petitioners could be held to have conspired. *Kline* v. *Coldwell, Banker & Co.*, 508 F.2d 226 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

In sum, the decision below fails to distinguish between legal and illegal means of furthering the boycott, between actions planned by the organizers to further the boycott and those engaged in independently by certain individuals, and between culpable and nonculpable persons. Yet, such distinctions are required where First Amendment rights are concerned. *See Citizens Against Rent Control/Coalition for Fair Housing* v. *City of Berkeley*, 50 U.S.L.W. 4071, 4072 (Dec. 14, 1981); *Selzer* v. *Fleisher*, 629 F.2d 809, 813 (2d Cir. 1980).

3. *The Mississippi Courts Imposed Unconstitutional Remedies.* This Court has held repeatedly that restrictions on First Amendment freedoms must be narrowly drawn. Both the injunction and the damage award at issue here violate that constitutional admonition. *See, e.g., Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 530, 540 (1980); *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 729-35 (1966).

The permanent injunction upheld by the Mississippi Supreme Court prohibits all further boycott-related activity, including peaceful marching, picketing, speechmaking and pamphleteering. Significantly, the constitutional infirmity of the sweeping injunction here at issue was pointed out by the Fifth Circuit Court of Appeals in a decision largely ignored by the Mississippi Supreme Court. *Henry* v. *First National Bank of*

Clarksdale, 595 F.2d 291 (1979), *cert. denied,* 444 U.S. 1074 (1980). Moreover, insofar as the injunction prohibits the Petitioners from "persuading, soliciting or advising . . . any person to withdraw his or her patronage" from the Respondents, it constitutes a bald and inexcusable regulation of the content of Petitioners' speech. *See Police Dept. of Chicago* v. *Mosley,* 408 U.S. 92, 95 (1972).

The decisions below are also constitutionally infirm with respect to the damages awarded. Respondents here are entitled to recover for damages caused by violent activity that actually resulted in injury to them, but they cannot recover losses that resulted from constitutionally protected activity or as against persons who bear no responsibility for unlawful behavior. *See United Mine Workers* v. *Gibbs, supra,* at 729. A contrary result by this Court would have a profoundly chilling effect upon political boycotts, because the risk of a crippling award of damages would increase with the success of each lawful boycott.

* * *

For all these reasons, the decision of the Supreme Court of Mississippi is wrong.

ARGUMENT

I.

THE PORT GIBSON BOYCOTT IS PROTECTED BY THE FIRST AMENDMENT

(A) Political Boycotts Are Protected by the First Amendment

As this Court noted only this month, "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." *Citizens Against Rent Control/Coalition for Fair Housing* v. *City of Berkeley,* 50 U.S.L.W. 4071, 4072 (Dec. 14, 1981). For this reason, politically motivated economic boycotts have a long and honored history in America. From the colonial

boycott protesting the Stamp and Townsend Acts to that called recently by our federal government to protest the Soviet invasion of Afghanistan, the established place in our political process of the boycott as protest has consistently been recognized. Concomitantly, this Court has held that the right of citizens to organize and induce a business boycott is guaranteed by the First Amendment as an exercise of the rights of free speech, assembly and petition.

For example, in *Thornhill* v. *Alabama,* 310 U.S. 88 (1940), the Court held that peaceful picketing—the most common form of inducement not to patronize and an activity intended in virtually every case to accomplish a "boycott"—is entitled to First Amendment protection. The Court there recognized that the purpose and natural consequence of picketing was "to induce . . . customers not to patronize the employer." 310 U.S. at 99. This Court expressly held, however, that the employer's economic interest was not of sufficient weight to allow the State of Alabama to interfere with Thornhill's First Amendment right to urge others to withhold their patronage from his employer. 310 U.S. at 104-05.

Significantly, a civil rights boycott the circumstances of which were virtually identical to the Port Gibson boycott was afforded First Amendmemt protection by the Fifth Circuit Court of Appeals in *Machesky* v. *Bizzell,* 414 F.2d 283 (5th Cir. 1969). There, as here, the boycotters sought the elimination of segregation and employment discrimination. There, as here, the boycotters engaged in picketing to dramatize and effectuate their end. And, there, as here, sporadic and isolated acts of violence and coercion occurred and were identified with members of the organization urging the boycott. The Fifth Circuit concluded that the state court injunction effectively terminating the boycott was unconstitutionally broad "in that it lumps the protected with the unprotected" and improperly enjoined "loitering or congregating . . . *to induce, persuade, or coerce any person or persons not to trade or to do other business* with [the] . . . Complainants." 414 F.2d at 291 (emphasis supplied).

Indeed, the Fifth Circuit applied these principles to the Port Gibson boycott and strongly suggested that it was protected:

> There is no suggestion that the . . . defendants were in competition with white businesses. . . . On the contrary, the boycott grew out of a racial dispute with the white merchants and the city government. . . . This differentiates this case from a boycott organized for economic ends, for speech to protest racial discrimination is essential political speech lying at the core of the First Amendment. *Henry* v. *First National Bank of Clarksdale,* 595 F.2d 291, 303 (5th Cir. 1979), *cert. denied,* 444 U.S. 1074 (1980).

More recently, the First Amendment implications of politically-motivated boycotts were addressed by the Eighth Circuit Court of Appeals in *Missouri* v. *National Organization For Women,* 620 F.2d 1301 (8th Cir.), *cert. denied,* 449 U.S. 842 (1980). That Court held that a noncommercial, politically motivated boycott is "privileged on the basis of the First Amendment right to petition." 620 F.2d at 1319. The critical consideration advanced by the Eighth Circuit in holding the boycott privileged was the fact that the "goal and sole purpose of NOW's economic boycott campaign is the ratification of the ERA." 620 F.2d at 1302. The intended intermediate goal of inflicting economic injury on Missouri's convention trade was viewed as incidental to this primary—and constitutionally protected—political purpose of the boycott. 620 F.2d at 1304 n.4, 1312 n.12.

Relying in large measure on this Court's decisions in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961), and *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508 (1972), the Eighth Circuit held that the organizers of and participants in a boycott to protest Missouri's failure to ratify the proposed Equal Rights Amendment could not be held liable for damages on antitrust or tort theories unless it were shown that the boycott was not

politically motivated but rather was a "sham" designed solely to cause economic injury to the businesses boycotted. 620 F.2d at 1316-19. *See also Sierra Club* v. *Butz,* 349 F.Supp. 934 (N.D. Cal. 1972).

In sum, as this Court observed in *Carey* v. *Brown,* 447 U.S. 455 (1980), boycotts which have "important economic, social, and political" purposes constitute "an exercise of . . . basic constitutional rights" which have "always rested on the highest rung of the hierarchy of First Amendment values . . . ." 447 U.S. at 466-67.

(B) Petitioners' Peaceful Activities in Support of the Boycott Are Entitled to First Amendment Protection

The Mississippi Supreme Court described the bulk of the Petitioners' boycott-related activity as involving "the marches and the pep speeches usually a part of such undertaking . . . the pickets with their signs; the group of men almost fifty in number who were specially conspicuous because they wore black headwear and perhaps other black clothing, so that they would be easily distinguishable . . . the 'Black Times' publications, . . . wherein the names of those being boycotted periodically appeared as well as names of some observed breaking the boycott." 393 So. 2d at 1297. The Court also noted the presence of "watchers," "guards" or "enforcers," a group of individuals whose "assignment" was to make others aware of the boycott and the fact that their participation was desired. *Id.* These principal boycott activities are forms of expression undoubtedly protected by the First Amendment. *See, e.g., Carey* v. *Brown,* 447 U.S. 455, 466-67 (1980) (peaceful marching); *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 776-77 (1978) (petitioning the government); *Old Dominion Branch No. 496* v. *Austin,* 418 U.S. 264, 279-87 (publishing names of nonunion "scabs").

As noted earlier, the Mississippi Supreme Court, quoting extensively from the trial court opinion, took issue with, and partially based the relief it afforded on, the presence of what it

called "violence," made up in large measure of "social ostracism, vilification and traduction." 393 So. 2d at 1300. But that some of the speech used during the course of the Port Gibson boycott amounted to "social ostracism, vilification and traduction" does not remove it from First Amendment protection. And, being legal and privileged in itself, it can hardly be a valid ground for finding the boycott or any part of it unlawful.

Thus, speech which "invite[s] dispute," "creates dissatisfaction," or even "stirs people to anger" is nevertheless "protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Terminiello* v. *Chicago,* 337 U.S. 1, 4-5 (1949). In fact, this Court has specifically held that the First Amendment protects even "vehement, caustic, and sometimes unpleasantly sharp attacks" on others. *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270 (1964). Pejorative terms, epithets, and even ridicule are entitled to the full shield of the First Amendment. *Old Dominion Branch No. 496* v. *Austin,* 418 U.S. 264 (1974); *see Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 339 (1974).

Similarly, the publication of the names of those who did not cooperate with the boycott, the "vilification" and "traduction" of such persons by those picketing white stores, and any resulting "social ostracism," are entirely protected by the First Amendment. *See, e.g., Old Dominion Branch No. 496, supra,* 418 U.S. at 279-87 (language that is "vituperative, abusive, and inexact" is entitled to First Amendment protection); *see also Watts* v. *United States,* 394 U.S. 705, 708 (1969).

Nor does the fact that petitioners' nonviolent expressions "intimidate[d]" or had coercive effect deny them First Amendment protection. As this Court said in *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415 (1971):

> The claim that the expressions were intended to exercise a coercive impact on respondents does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondents' conduct by

> their activities; this is not fundamentally different from the function of a newspaper. . . . [S]o long as the means are peaceful, the communication need not meet standards of acceptability. 402 U.S. at 419.

See also Gooding v. *Wilson,* 405 U.S. 518, 520 n.1 (1972) (First Amendment protects statements including "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces"); *Street* v. *New York,* 394 U.S. 576, 592 (1969) (speech cannot be prohibited because audience offended or angered).

* * *

Thus, the Port Gibson boycott, the peaceful picketing, speechmaking, marching and pamphleteering that attended it, and even the "intimidation, . . . social ostracism, vilification and traduction" that may have occurred over the years of the boycott, were activities that enjoy the protection of the First Amendment. As such, they do not form, even taken together, a constitutionally permissible basis for the damages and injunctive relief imposed by the Supreme Court of Mississippi.

(C) The Decision of this Court in *Milk Wagon Drivers' Union Local 753* v. *Meadowmoor Dairies, Inc.* Does Not Support the Result Below

The First Amendment to the Constitution does not provide an absolute and unbridled right of speech. And, of course, violence itself is entirely unprotected conduct. As a result, this Court has held that there may be circumstances of pervasive violence under which First Amendment freedoms to picket and boycott might be required to yield to the police power of the states. *Milk Wagon Drivers' Union Local 753* v. *Meadowmoor Dairies, Inc.,* 312 U.S. 287 (1941).

The Mississippi courts relied almost exclusively on *Meadowmoor* to conclude that the Port Gibson boycott was unlawful in its entirety. It is noteworthy that the *Meadowmoor* case was decided forty years ago, well before the development of the

First Amendment principles relied upon here, and related to a labor dispute, not political expression.[6] But, even assuming that *Meadowmoor* has any vitality in a civil rights context, the case does not support the decision below.

First, as discussed previously, the Mississippi Courts thought that under *Meadowmoor* "social ostracism, vilification, and traduction" were unlawful and without First Amendment protection. That, of course, is simply wrong. *Meadowmoor* applied to pervasive and inevitable violence, and to violence only.

Second, in *Meadowmoor* this Court found picketing beyond First Amendment protection because the entire union activity was "enmeshed" with violence. 312 U.S. 291-92. Thus, *Meadowmoor* involved more than 50 instances of window smashing, explosive and stench bombs that caused substantial injury to property, wrecking of trucks and serious injury of a driver, arson and near total ruin of a store and several trucks, and severe beatings of both employers and employees. And even in *Meadowmoor,* this Court made it clear that the judicial balance in future picketing cases must be weighted toward First Amendment freedoms and that the guarantee of free speech must be given "generous scope." 312 U.S. at 296. Specifically, the Court said that the "[r]ight to free speech in the future cannot be forfeited because of dissociated acts of past violence." *Id.*

Nor have this Court's decisions permitted a forfeiture of freedom of expression in circumstances less compelling than those presented in *Meadowmoor.* It is worth emphasizing that *not a single case* has come to this Court in the past forty years presenting circumstances of violence so "enmeshed" with

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6 Political expression rests on the "highest rung of the hierarchy of First Amendment values." *Carey* v. *Brown,* 447 U.S. 455, 466-67 (1980). The labor picketing involved in *Meadowmoor,* while protected by the First Amendment, is subject to greater governmental restriction. *See* T. Emerson, *The System of Freedom of Expression,* 444-49 (1970), cited in *Carey* v. *Brown, supra,* 447 U.S. at 466.

peaceful activity as to remove entirely First Amendment protection from peaceful picketing and boycott activity. Rather, from the day *Meadowmoor* was decided, it has been distinguished by this Court.[7] Indeed, this Court has made clear that the *Meadowmoor* cannot be applied unless there has been a finding that violence is an inseparable and inevitable part of the protest activity. *See Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131, 139 (1957); *Cafeteria Employees Union Local 302* v. *Angelos,* 320 U.S. 293, 296 (1943). The Mississippi courts made no such findings (nor could such findings have been made) in the present case and held instead that the simple "presen[ce]" of contemporaneous, but sporadic, violence over a period of years rendered the Port Gibson boycott illegal. That holding is plainly incorrect.

* * *

In sum, while the sporadic acts of violence that may have been "present" in Port Gibson, Mississippi during the years of the NAACP boycott were themselves punishable both civilly and criminally, this Court's decisions have made it perfectly clear that the boycott itself—including any attendant "social ostracism, vilification, and traduction"—was protected by the First Amendment.

II.

THE PETITIONERS CANNOT BE HELD LIABLE ON THE GROUND THAT THE BOYCOTT WAS AN UNLAWFUL CONSPIRACY

The court below based its finding of liability as to all Petitioners upon a theory of civil "conspiracy." This was error, both as a matter of conspiracy law and because such a holding is repugnant to the First Amendment.

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7 *See, e.g., Cafeteria Employees Union Local 302* v. *Angelos,* 320 U.S. 293, 296 (1943); *A.F. of L.* v. *Swing,* 312 U.S. 321, 323, 325, 329 (1941). *See also Machesky* v. *Bizzell,* 414 F.2d 283, 290-91 (5th Cir. 1969).

The requisite elements of a conspiracy are simply not present in this case. While it has been said that the "chameleon-like" doctrine of conspiracy is "so vague that it almost defies definition," *Krulewitch* v. *United States,* 336 U.S. 440, 446-47 (1949) (Jackson, J., concurring), and that "no intelligible definition of conspiracy has yet been established," *see* 336 U.S. at 446 n.3, it is well established that no conspiracy exists unless there is an agreement to accomplish an *unlawful* purpose, or an agreement to accomplish a lawful purpose by *unlawful* means. *See Iannelli* v. *United States,* 420 U.S. 770, 777 (1975); *Arlinghaus* v. *Ritenour,* 622 F.2d 629, 639 (2d Cir.), *cert. denied,* 449 U.S. 1013 (1980); *United States* v. *Molina,* 581 F.2d 56, 61 (2d Cir. 1978); *Rotermund* v. *U.S. Steel Corp.,* 474 F.2d 1139, 1145 (8th Cir. 1973). Apparently the Mississippi courts recognize as much. 393 So. 2d at 1301.

Moreover, even if a "conspiracy" could be demonstrated by the fact that some individuals who were members of Petitioner NAACP had agreed among themselves to use unlawful means to effectuate the boycott, such evidence could not support a finding that membership in the NAACP in and of itself constituted membership in the conspiracy. Nor could such evidence support a finding that the NAACP itself or all of its members participating in the boycott were parties to such a conspiracy. It would still be necessary to show that each NAACP member—and indeed the NAACP itself—entered into the agreement to commit unlawful acts. Thus, in *Kline* v. *Coldwell, Banker & Co.,* 508 F.2d 226 (9th Cir. 1974), *cert. denied,* 421 U.S. 963 (1975) the plaintiffs contended that a trade association had conspired to fix prices, and that all of the members of the association could therefore be charged with participating in the conspiracy. The Ninth Circuit rejected this claim, holding that

> [T]he individual . . . members of the associations can be held responsible for the unlawful conspiratorial acts or declarations of the associations only if they are shown to have known and approved of such activities and of their unlawful objectives. 508 F.2d at 231, quoting *Riss & Co.*

v. *Ass'n of American Railroads*, 187 F. Supp. 306, 312-13 (D.D.C. 1960).

Similar results were reached in *Vandervelde* v. *Put & Call Brokers & Dealers Ass'n, Inc.*, 344 F. Supp. 118, 155 (S.D.N.Y. 1972) (to establish participation in the conspiracy it must be shown that the association member "knew of and condoned the [illegal] act in issue"); and *Riss & Co.* v. *Ass'n of American Railroads*, 187 F. Supp. 306, 312-13 (D.D.C. 1960).

The court below found that because of the "agreed use" of violence and other illegal acts to effectuate the boycott, "[t]he presence of a conspiracy is beyond preadvanture." 393 So. 2d at 1301. Yet there is no recitation in either decision below of any evidence suggesting that all Petitioners agreed to employ violence or other illegal means in this political boycott.[8] The conclusion below that a conspiracy existed was erroneous because it (a) failed to distinguish between legal (*e.g.*, the "social ostracism, vilification, and traduction") and illegal means of furthering the boycott; (b) failed to distinguish actions planned as part of the boycott and sporadic violent actions engaged in independently by certain individuals; and (c) failed to consider separately the culpability of each defendant. *Compare Selzer* v. *Fleisher*, 629 F.2d 809, 813 (2d Cir. 1980).

As this Court recently observed, "[t]here are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them." *Citizens Against Rent Control/Coalition for*

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8 The chancellor's finding—adopted by the Mississippi Supreme Court—that "certain of the defendants, *acting for all others*, engaged in acts of physical force and violence," 393 So. 2d at 1300, seems to be no more than a restatement of those courts' miscomprehension of conspiracy law. The statement is true only if a conspiracy is first established, and then only as to those found to be co-conspirators, but not otherwise. *E.g.*, *Pinkerton* v. *United States*, 328 U.S. 640, 647 (1946); *United States* v. *Bermudez*, 526 F.2d 89, 98 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976).

Fair Housing v. *City of Berkeley, supra,* 50 U.S.L.W. at 4073. Because in this case the First Amendment rights of a large group are alleged to have been forfeited by the actions of a few individuals, the Constitution required the Mississippi courts to distinguish carefully between protected and unprotected activity and culpable and non-culpable persons, as discussed previously. The Mississippi courts made no such distinctions, and, accordingly, the decision below is not consistent with the First Amendment.

III.

THE REMEDIES IMPOSED BY THE MISSISSIPPI COURTS ARE UNCONSTITUTIONAL

This Court has made clear time and again that the First Amendment demands that any regulation of speech be "precisely drawn."[9] "Broad prophylactic rules" regulating speech are constitutionally unacceptable. *NAACP* v. *Button,* 371 U.S. 415, 438 (1963). Prior restraints on speech are particularly suspect, *see Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539, 559 (1976), but these admonitions against unnecessarily broad regulation of speech apply with equal force to both the injunctive relief and damages at issue in this case.[10]

(A) The Injunction Imposed Below Violates the First Amendment

The permanent injunction upheld by the Mississippi Supreme Court prohibits all further boycott-related activity, including peaceful marching, picketing, speechmaking and pam-

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9 *Consolidated Edison Co.* v. *Public Serv. Comm'n,* 447 U.S. 530, 540 (1980); *Police Dept. of Chicago* v. *Mosley,* 408 U.S. 92, 101 (1972); *Coates* v. *City of Cincinnati,* 402 U.S. 611, 614 (1972); *Carroll* v. *President and Comm'rs of Princess Anne,* 393 U.S. 175, 183 (1968).

10 *See United Mine Workers* v. *Gibbs,* 383 U.S. 715, 729-35 (1966); *United Mine Workers* v. *Pennington,* 381 U.S. 657, 671-72 (1965); *cf. Teamsters Local 20* v. *Morton,* 377 U.S. 252, 259-62 (1964).

phleteering, and is therefore fatally defective in breadth. For example, in *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131 (1957), this Court approved of an injunction against threatening or provoking violence or obstructing ingress or egress to a business, but it made clear that violence "scattered in time and [largely] . . . unconnected with . . . picketing" was insufficient to warrant a broader injunction prohibiting all "picketing or patrolling." 355 U.S. at 139[11]

It is worth emphasizing, in this connection, that the Mississippi Supreme Court totally ignored the holding of the Fifth Circuit Court of Appeals with respect to the impropriety of the injunctive relief at issue in this very case. *Henry* v. *First National Bank of Clarksdale*, 595 F.2d 291 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980). In *Henry*, the present Petitioners obtained an injunction against the Mississippi Supreme Court's requirement that Petitioners post over a million dollars bond as a condition of pursuing their appeal. In concluding that Petitioners had a substantial chance of prevailing on appeal, the Fifth Circuit quite correctly said:

> The state court's injunction, however, was not limited to prohibiting acts or threats of violence but extended to every form of speech or activity designed to discourage for whatever reason anyone from trading with the businesses of the state plaintiffs. This sort of sweeping prohibition on speech and communication raises serious constitutional problems. 595 F.2d at 303.

To the same effect is the Fifth Circuit's decision in *Machesky* v. *Bizzell*, 414 F.2d 283 (5th Cir. 1969), a case presenting factual circumstances nearly identical to those at issue here. There, as here, the Mississippi courts approved a broad injunction that failed to balance the State's interest in preventing violence with the First Amendment right of peaceful boycotters to continue their protest. The Fifth Circuit found the Mississippi court's action unconstitutional:

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11 *See also Kunz* v. *New York*, 340 U.S. 290, 294-95 (1951); *Near* v. *Minnesota*, 283 U.S. 697, 721-22 (1931).

> The injunction here, however, has not struck such a balance. It prohibits all picketing in the designated business areas of Greenwood, for whatever purpose and in whatever manner carried out. This overshoots the mark and the situation cannot be saved by *Milk Wagon Drivers' Union* v. *Meadowmoor Dairies*, . . . a case premised on violence of an intensity and duration in no way present here, or at least on the record before the District Court. 414 F.2d at 290-91.

To make matters worse, the injunction at issue prohibits the Petitioners from "persuading, soliciting, [or] advising . . . any person to withdraw his or her patronage or to cease trading with the complainants." This prohibition imposes a bald restriction on the content of Petitioners' future speech and is obviously invalid. *Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972).

Here, the Mississippi Supreme Court has held punishable and restrained a political message held lawful at least since *Thornhill* v. *Alabama, supra.* It has effectively prevented and punished speech that it characterizes as "intimidation, vilification and traduction," or that causes "social ostracism." And it has accomplished its objective with a sweeping regulation that prohibits even the most innocent spoken efforts to "persuade" consumers to withhold their patronage. This is a prior restraint in the most obvious sense, and grossly overreaches the proper bounds of governmental regulation of speech. *See Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 559 (1976).

(B) Damages May Not be Awarded for Losses Caused by Boycott Activities

To the extent that activities during the boycott exceeded constitutional limits, respondents may recover damages caused by such unprotected activity from the individuals who acted unlawfully. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959). However, the Mississippi court has gone well beyond this, and has awarded damages to respondents not only for the consequences of supposedly unlawful

acts, and not only against persons acting improperly, but against all respondents for business losses caused by constitutionally protected, peaceful boycott activities.

The prior decisions of this Court make it plain that such a rule of law is untenable. While this Court has consistently recognized the right of states to provide remedies for violence which occurs in the course of picketing, "the permissible scope of state remedies in this area is strictly confined to the direct consequences of such conduct, and does not include consequences resulting from associated peaceful picketing." *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 729 (1966); *see United Mine Workers* v. *Pennington,* 381 U.S. 657, 671-72 (1965); *Youngdahl* v. *Rainfair, Inc.,* 355 U.S. 131, 139-40 (1957).

In *United Mine Workers* v. *Gibbs, supra,* the Court ruled that where a union strike was marred by violence, damages could be recovered only for the unlawful violence and not for the lawful picketing. 383 U.S. at 729-35. The Court rejected the argument that its decision in *Meadowmoor, supra,* authorized a broader award of damages. Rather, the Court noted that *Meadowmoor* involved "special facts"—namely, "extreme and repeated acts of violence" which were so entangled with the picketing that such violence "would inevitably reappear" if picketing were not enjoined. 383 U.S. at 731. Without deciding whether the rationale of *Meadowmoor* could be applied to an action for damages rather than injunctive relief, the Court did conclude that "[w]hen the consequences of peaceful and violent conduct are separable, however, it is clear that recovery may be had only for the latter." 383 U.S. at 732. *See also United Mine Workers* v. *Pennington, supra* (damages awarded for Sherman Act conspiracy must exclude damages caused by lawful efforts to influence public officials).

The undifferentiated award of damages for both lawful and unlawful boycott activity also contravenes the fundamental principle that restraints on free speech must be narrowly drawn. *E.g., United States* v. *O'Brien,* 391 U.S. 367, 376-77 (1968); *United States* v. *Robel,* 389 U.S. 258, 268 (1967); *Shelton* v. *Tucker,* 364 U.S. 479, 488-89 (1960). When a state

wishes to punish or impose restrictions upon acts related to the exercise of free speech, it must do so in the manner which least interferes with protected First Amendment rights.

Thus, if respondents can prove that they were injured by the few acts of violence identified in the record, they are entitled to damages from those who caused them. But there is no support for an award of damages compensating respondents for the lawful effects of peaceful boycott activity or against all the participants in the boycott. Indeed, a contrary result would have a profoundly chilling effect upon political boycotts, for the risk of a crippling award of damages would increase with the success of each lawful boycott. The Mississippi Supreme Court's rulings on damages ignored this fundamental point and accordingly, should be set aside.

CONCLUSION

For the foregoing reason, *amicus* American Jewish Congress urges this Court to reverse the decision below.

Respectfully submitted,

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December, 1981